

TRANSFER OF PUBLIC TRUST TO PRIVATE TRUSTEES PERMITS CONTINUED SCHOOL SEGREGATION

In re Girard College Trusteeship,
391 Pa. 434, 138 A.2d 844, cert. denied, 357 U.S. 570,
rehearing denied, 358 U.S. 858 (1958)

Stephen Girard's will, probated in 1831, gave two million dollars to "the Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust . . ." to establish a college for "poor white male orphans." The college was opened in 1848 under the management of the city council, and in 1869, as the result of an act of the state legislature,¹ its control was assumed by the Board of Directors of City Trusts. On September 24, 1954, two Negro orphan boys applied for and were denied admission to Girard College solely because of their race. Subsequent litigation resulted in a per curiam decision by the Supreme Court of the United States that:

The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment.²

Upon remand, the Orphans' Court of Philadelphia County dismissed the petitions and replaced the Board of City Trusts with thirteen persons as trustees of the Girard Estate. This action was affirmed by the Pennsylvania Supreme Court, and upon appeal the Supreme Court of the United States denied certiorari.³

Of course, the denial of certiorari has not made the Pennsylvania decision the law of the United States.⁴ The Court's action is ambiguous, and may have resulted simply from a policy of limitation on judicial

¹ PA. STAT. ANN., tit. 53 § 16365 (1957).

² *Pennsylvania v. Board of Trusts*, 353 U.S. 230, 231 (1957).

³ *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, cert. denied, 357 U.S. 570, rehearing denied, 358 U.S. 858 (1958).

⁴ "[S]uch a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950). There are several possible reasons why certiorari was denied: (1) The Pennsylvania decision was correct. This does not appear to be the probable reason, however, for the Court in holding that the city could not constitutionally administer the trust, cited *Brown v. Board of Education*, 347 U.S. 483 (1954), suggesting that *Girard* was to be controlled by their attitude toward public education, which has been quite hostile toward attempts to avoid desegregation. *Cooper v. Aaron*, 358 U.S. 1 (1958). (2) A decision on the constitutional issue could be avoided by construing the Pennsylvania courts' actions as having complied, if only literally, with the Court's mandate that the city could not administer a discriminatory trust. (3) The case was not "ripe" for appellate review because there was no definitive action by the new private trustees on Negroes' applications for admission.

review. It is therefore quite probable that the validity of the action of the Pennsylvania courts will soon be tested by a new suit correcting any procedural defects of the instant suit. The Court will then be forced to decide if the replacement of public trustees by private trustees, solely because the former can not enforce the racially discriminatory provision of Girard's will, is itself a discriminatory state action.⁵ The fourteenth amendment provides that no state shall deny any person equal protection of the laws; there is no prohibition on discrimination by private persons.⁶ To understand what constitutes a "state action," one must first determine what each of the two words, "state" and "action" means.

The action has been held that of the "state" when accomplished by the state legislature,⁷ the state judiciary,⁸ a state agency,⁹ a municipality,¹⁰ or persons performing a quasi-governmental function such as the operation of a private primary election.¹¹ A state, furthermore, cannot relieve itself of constitutional restrictions by transferring the management of its affairs to a private organization.¹² Although Girard College was founded on private funds, its establishment also required at least five acts of the Pennsylvania General Assembly and forty-eight ordinances of the Philadelphia City Council.¹³ Except as to the removal of the Board as trustee, the instant action does not purport to invalidate any of these statutes, so there appears to have been action by both the state legislature and the city. The orphans' court, by removing the Board, and the state supreme court, by affirming, have acted as representatives of the state in

⁵ This problem was side-stepped by the majority who contended that "the complained of discrimination in the instant case does not impinge upon any *civil right* to which the minor petitioners have a constitutional claim along with all other members of the community." 391 Pa. at 450, 138 A.2d at 851. Although such reasoning might once have been convincing, it is difficult to embrace in view of the United States Supreme Court's decision in *Pennsylvania v. Board of Trustees*, *supra* note 2. It is quite awkward to say that these Negro boys have no constitutional right to admission, yet their exclusion by the city is unconstitutional discrimination.

⁶ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁷ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

⁸ *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Ex parte Virginia*, 100 U.S. 339 (1880). The majority in the instant case concede this point. 391 Pa. at 450, 138 A.2d at 851.

⁹ *Pennsylvania v. Board of Trustees*, *supra* note 2; *Nixon v. Herndon*, 273 U.S. 536 (1927).

¹⁰ *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹¹ *Terry v. Adams*, 345 U.S. 461 (1952). *Accord*, *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944).

¹² *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954). *Accord*, *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W. Va. 1948); *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E.2d 82 (1948).

¹³ *In re Girard College Trusteeship*, 391 Pa. 434, 468, 138 A.2d 844, 859 (1958) (dissent).

this matter. Caring for orphans is ordinarily a governmental function¹⁴ and in the instant case the city of Philadelphia is the legal guardian of every child admitted to Girard College until he reaches the age of twenty-one.¹⁵ Under the Pennsylvania decision thirteen private persons have taken over a function of the city (and hence of the state) for, although these orphans are wards of the city, their complete care and education is entrusted to Girard College.

The issue as to what constitutes "action" sufficiently discriminatory on the part of the state to violate the fourteenth amendment is perhaps more difficult to discern than what constitutes a "state". In *Shelley v. Kraemer*,¹⁶ it was held discriminatory state action for a state court to order the enforcement of private restrictive covenants which would exclude persons of designated race or color from the ownership or occupancy of real estate. The *Shelley* principle was extended slightly in *Barrows v. Jackson*,¹⁷ where it was held unconstitutional to award damages for breach of a similar restrictive covenant. The rationale is that "once courts enforce the agreement the sanction of the government is, of course, put behind them,"¹⁸ and the private discrimination has been adopted by its enforcement. The Pennsylvania court rejects the application of this rationale to *Girard*, for, in the instant case, there has been a judicial recognition of private discrimination and an action by the court without which the private discrimination would be ineffectual.

Determining whether discrimination in an educational system is the act of private persons or of the state is analogous to determining whether there has been an infringement of the separation between church and state, where there has been aid to education generally which has to some degree benefitted parochial schools as well as public schools. The real reason for such separation is to avoid discrimination in favor of a particular religion.¹⁹ Although there is a wall of separation between church and state, there is not a complete "hands-off" policy. The state may contribute economic support to education generally, provided the effect on promotion of religious dogma is remote.²⁰ The problem arises when

¹⁴ "A minor, deprived of parental care, control, and oversight, is considered a person under disability, a ward of the state, over whom the state may and should exercise its sovereign power of guardianship, through its duly constituted agencies; and, as *parens patriae*, may assume for him parental authority and duty." 43 C.J.S. *Infants* § 4 (1945).

¹⁵ PA. STAT. ANN., tit. 53, § 16339 (1957).

¹⁶ 334 U.S. 1 (1948).

¹⁷ 346 U.S. 249 (1953).

¹⁸ *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232 n.4 (1956).

¹⁹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

²⁰ *Everson v. Board of Education*, 330 U.S. 1 (1947). The Board reimbursed parents for money spent for bus transportation to parochial schools as well as public schools as a safety measure. Similarly, the state possibly could provide free textbooks to all schools to insure uniformity, free or subsidized lunches to all children for better nutrition, or support for teachers' salaries in all schools to attract better qualified teachers and upgrade education generally.

there is too much help and cooperation or when there are too many strings attached. The question in each case should be whether the state by its action has become so intimately associated with the private party, either because of the enormity of a single act or the cumulative effect of numerous smaller acts, that the state itself has become an effective source of discrimination.

The majority of the Pennsylvania court contends that if all that is required for unconstitutional discrimination "is state action and a racial or religious discrimination, then no private charity created by will can any longer dispense its benefits on the basis of race, creed or color according as its settlor has stipulated."²¹ This is supposedly true because the will has no effect until it has been probated and admission of the will to probate is a judicial action of the state. The same syllogism may produce a contrary result by merely interpreting the words "state action" in the major premise to mean that the action of the state must be the effective source of the discrimination. The admission of a will to probate is basically a ministerial, passive operation as compared to the authoritative, positive act of the testator. Whether or not the discrimination is that of the state or the testator should be determined on the facts of a particular case.

In *Girard*, the testator evinced a dual intent: (1) that the school be limited to white orphans, and (2) that it be publicly administered. The college was in fact so operated, exclusively white and by the city of Philadelphia for 110 years. It appears to be more than a mere ministerial act for the orphans' court to remove the public trustees provided for by *Girard* and replace them with private trustees in order that the exclusion of non-white students might continue. There is not only the probate of the will, but an action voiding a portion of it. This is a situation which would logically call for the application of the doctrine of *cy pres*,²² which demands a greater degree of judicial discretion than that which is deemed merely ministerial. Although it seems certain that a line must be drawn beyond which the rule of *Shelley v. Kraemer* does not extend,

²¹ 391 Pa. at 454, 138 A.2d at 853.

²² "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." RESTATEMENT, TRUSTS § 399 (1935). Application of *cy pres* in such a case as *Girard* is well-supported by case authority. In *Reeser Estate*, 1 Pa. D. & C.2d 731 (O. C. Berks 1954), a scholarship to study medicine was awarded to a girl, instead of "some reliable boy," after the funds had accumulated for twenty years. An English case nearly "on all fours" on its facts with *Girard* is *In re Dominion Students Hall Trust*, [1947] 1 Ch. 183, in which a restriction to students of European origin was removed. *Accord*, *Trustees of Pittsfield Academy v. Attorney General*, 95 N.H. 51, 57 A.2d 161 (1948); *Exeter v. Robinson Heirs*, 94 N.H. 463, 55 A.2d 622 (1947); *In re Queen's School Chester*, [1910] 1 Ch. 796.

it does not necessarily follow that if *Shelley* is to control *Girard* it must control cases where the only action by the state is the probate of a will which discriminates on the basis of race, creed or color. Thus, if a settlor provides a trust for the exclusive use of a particular ethnic or religious group and also provides for private trustees, a contrary result in *Girard* would not of necessity demand a finding that this is unconstitutional solely because of the probate of the will. The effective source of the discrimination is the act of the settlor, not that of the court in admitting the will to probate.

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